Conference, of a Code of Public International Law and of a Code of Private International Law, which shall serve as the rules to be observed in the relations between the Nations of America.

Committee Room, January 11, 1902,—(Signed) *F. L. de la Barra.—Baltasar Estupinian.—Fernando E. Guachaya.—Antonio Bermejo.—Emilio Bello C.—Juan Cuestas.—Alejandro Alvarez*, Secretary.

His Excellency Mr. de la Barra.— Messrs. Delegates: The subject matter of the Project which has just been read being obvious, and as it constitutes the complement of a resolution already adopted by the Conference the Committee on International Law has the honor to request the Delegates to dispense with the rules and to take this motion in consideration inmediately.

The motion being taken up immediately and put to discussion, it was unanimously adopted, discussion being dispensed with.

Secretary Duret.—The Chair rules that the report as adopted be referred to the Committee on Engrossing.

SESSION OF JANUARY 24 1902.

Secretary Duret.—In compliance with the resolution adopted by the previous session,[1] the reports of the Committee on Engrossing on the following resolutions of the Conference are at the disposition of the Delegates:

III. Codification of International Law.

The report on Codification of International Law referred to reads as follows:

«Committee on Engrossing. The undersigned have the honor to propose the following wording of the project of Convention adopted by the Conference for the formation of the Codes of Public and Private International Law of America:

Article 1. The Secretary of State of the United States of America and the Ministers of the American Republics accredited in Washington shall appoint a Committee of five American and two European jurists, of acknowledged reputation, to be entrusted with the drafting, during the interval from the present to the next Conference, and in the shortest possible time, of a Code of Public International Law which will govern the relations between the American Nations.

Article 2. As soon as said Codes have been drafted, the Committee shall cause them to be printed and submit them to the consideration of the respective Governments of the American Nations, in order that they may make such suggestions as they may deem advisable.

Article 3. After said suggestions have been systematically classified, and the Codes have been revised in conformity with them by the Committee which drafted them, they shall be submitted again to the Governments of the American Republics to be adopted by those who desire it, either in the next American International Conference or by means of Treaties negotiated directly.

Article 4. The Committee in charge of the drafting of the Codes shall conduct its work at such European or American capital as the Diplomatic Corps authorized to appoint it may designate, in conformity with Article 1.

Such expense as may be incurred by this Convention shall be defrayed by the Signatory Governments in the same form and proportion as those in force with regard to the Bureau of American Republics.

Article 5. The Governments that may desire to ratify the present Convention shall communicate it to the Secretary of State of the United States of America, within one year counted from the closing of this Conference.

México, January 24, 1902.—(Signed).—*Alberto Elmore.—Rosendo Pineda.*

The Convention for the formation of the Codes of Public and Private International Law of America, conceived exactly in the same terms as the foregoing report, was signed on the 27th. of January, 1902 by the Delegates of the Argentine Republic, Bolivia, Colombia, Costa Rica, Chili, Dominican Republic, Ecuador, Salvador, United States, Guatemala, Hayti, Honduras, Mexico, Nicaragua, Paraguay, Peru and Uruguay.

[1] See page 73.

NUMBER 8.

Patents of Invention, Industrial Drawings and Models and Trade marks of Comerce and Manufacture.

SESSION OF DECEMBER 16 1901.

Secretary Macedo.—The Committee on Patents of Invention and Trade marks has submitted its report, and the Chair rules that it be printed and distributed among Their Excellencies the Delegates, which report reads as follows:

REPORT of the Committee on Patents, Trade Marks and Weights and Measurea, relative to Trade Marks.

Messrs. Delegates:

The Treaty relative to commercial trade-marks agreed upon at Montevideo on the 16th. of January 1889, and which has been ratified and perfected by several of the signatory Powers, stipulates in its article 1 the recognition of the right of the person who has been declared owner of a trade-mark in one of those countries, to secure in the other States the same privilege in conformity with the formalities and conditions established by their respective laws. Adulterations or falsifications are to be persecuted likewise, in accordance with the said law, in the country, where the infringement has taken place, as provided for by article 4.

Such clauses, while they guarantee the ownership already legally acquired in one of the contracting nations, do no affect the integrity of the legislation of each country in so far as procedure is concerned, or in so far as the requisites that are demanded for the acknowledgement of such right, and also to the sanction applicable whenever attacked. Such stipulations are so fundamental that it might be held that they should constitute national laws, as is already the case in various countries, if the convenience of establishing reciprocity between the States should not make it preferable that such regulations be incorporated in an international agreement.

Article 2. of that treaty established the requisites and powers which are inherent to the ownership of a trade-mark, so that it may be used, transferred or sold.

Article 3. defines a trade mark as a distinctive sign of merchandise or products, and it considers the manner in which the models and drawing of the manufactures are so protected in the same identical manner.

Such are the substantial terms of the said treaty.

Articles 6 and 7 provide that it be enacted for an indefinite time, and that its abrogation can only take effect two years after receipt of proper notification to that effect.

Article 5. substitutes the act of ratification by the mere exchange of communications, and the 6th. permits other States to agree to the terms of said treaty.

As the object of an international convention is not intended to recognize only certain rights, but also to facilitate their application, the reporting Committee proposes the following addition to the Treaty of Montivideo, under reference.

«That the transmission of the aplication, and of the models, from one nation to the other, and the compliance of all other regulations established in that State wherein the acknowledgement is demanded to the recognition of propietory rights granted in another signatory State, may be secured through the latter's Consuls, the applicant paying all expenses which are caused by his demand. In that manner, while the local legislation is duly observed, facilities are granted for the foreign owner of the trade-mark, diminishing his expenses and freeing him from the necessity of making use of private agents who are not always available in other countries. Such was the vote of the International Congress of 1878 on Industrial Property.

In view of the foregoing, while rendering a report on the proposition of the Honorable Delegate for Uruguay on the adoption by this Conference of the said Treaty of Montevideo, the undersigned Committee offers the following conclusions:

1. The International Conference at Mexico accepts the principles of the Treaty of Montevideo on trade-marks signed on the 16th. of January 1889.

2. The person who may have secured in any of the States that have signed the Treaty, the exclusive right to any trade-mark, may apply to the respective Consuls of the said countries for the procurement of the same privileges; These functionaries shall transmit to their Goverments the applications and corresponding models, as well assufficient funds, in order that the necessary steps be taken for the carrying on of such proceedings.

3. The Delegates who shall approve of this report, and who shall be properly authorized by their Governments, or who may be so authorized before this Conference closes its labors shall sign this treaty under the terms now proposed.

4. The communications addressed by the Governments ratifying this Treaty, to that of Mexico, in order that the latter may so inform the other contracting States, shall be considered as the proper exchange of ratificationes of such treaty. The Mexican Government will communicate in like manner its own ratification, if it decides to give its acquiescence.

5. The acquiescence of the other Nations of America that may not have signed originally the said treaty, shall be made known in the same manner.

Mexico, December 3. 1901.—*Alberto Elmore.—Cecilio Baez.—Alfredo Chavero.*

TREATY of Montevideo to which reference is made in the foregoing report.

Art. 1. Every person to whom any one of the Signatory Powers has granted the right to the exclusive use of trade or factory mark, shall enjoy the same privilege in the other states, subject to the formalities and conditions established by their laws.

Art. 2. The ownership of trade mark comprises the right to use, transfer and sell the same.

Art. 3. There shall be considered as á trade manufacture mark the sign, emblem or external name, which the manufacturer may adopt and apply to his wares and products, in order to distinguish them from those of other manufacturers or merchants who deal in articles of the same kind.

To this class of marks belong also the so-called factory drawings or patterns which by the means of the texture or by impressions are stamped on the very product which is put on sale.

Art. 4. Falsifications and adulterations of trade or factory marks, shall be prosecuted before the courts, in conformity with the laws of the State in whose territory the fraud may have been committed.

Art. 5. It is not indispensable that this treaty be ratified simultaneously by all the Signatory Powers in order that it be in force. The nation that may approve it, will so inform the Governements of the Republics of Uruguay and Argentine, in order that they may make it known to the other contractng nations. Such procedure shall serve in lieu of exchange of ratifications.

Art. 6. As soon as the exchange in the form prescribed by the preceeding article is effected, this treaty shall remain in force indefinitely from the time of such act.

Art. 7. If any of the Signatory Powers should think it proper to withdraw from this treaty, or to introduce modifications to the same, it shall so inform the others, but such withdrawal shall take effect only two years after such denouncement, during which time an endeavor shall be made to enter into á new agreement.

Art. 8. Article 5 may be extended to those nations who, although they have not taken part in this Congress, may desire to join in the present treaty.

SESSION OF DECEMBER 23, 1901.

Secretary Duret.—The report of the Committee on Patents, Trade marks and Weights and Measures is now under discussion as a whole.

His Excellency Mr. Casasus, Delegate from Mexico.—Messrs. Delegates: I had no desire to take part in the debate of the Project of the Treaty on Trade marks; not only, because I did not wish to appear as disagreeing with the Committee, but also

because I feared that it might be so construed as if the honorable Delegate from Mexico, member of the Committee, did not share the ideas which I entertain in this respect. For this reason I suggested in a confidential manner to the honorable members of the Committee a few indications, some modifying and amplifying the text of the treaty, and others giving greater scope to the objects proposed in the said treaty.

The Committee has believed, that it could not accept my suggestions, and this compels me to submit them to the Conference, so that if anybody thinks that there is anything useful in them, he may second them, in order that the Committee may have an opportunity to state its own ideas. I do not desire to oppose the report of the Committee: it is sufficient that it is signed by a member of the Mexican Delegation, to prevent that any member of the delegation of this country should consider himself sufficiently justified for such a course.

Entering upon the matter, I ask to be permitted to call attention to the terms in which the report is conceived and the modifications which could be made in the same. The convention of Montevideo, in the form in which its Art. 1. is worded, appears to concede the right, that in the signatory countries only and exclusively those marks can be registered, regarding which their owners have made the corresponding reservation in the country of their origin. The evolution of the right of property of Trade marks has run through four distinct stages. In the first one, the right of a foreigner to deposit his marks was absolutely denied; in the second, the foundation of an industrial and comercial establishment was required, in which the products, which were intended to be protected by the trade marks, were to be disposed of; in the third, the condition was imposed, that the mark of a foreigner must have been deposited in the country of its origin; and finally, in the fourth, equal and identical privileges were granted to the citizens and foreigners.

The text of the treaty of Montevideo explains the right to register a trademark and can only be granted to those who have already registered it in the country of its origin, since, it reads literally as follows: «Any person to whom the right of using a commercial or manufacturer's trade mark has been granted in one of the signatory States, shall enjoy the same privileges in the other States.» If this is not the under standing of the Treaty of Montevideo, it is worth while to rectify it; but if my interpretation of the text is correct, it might be advisable to modify it, because it cannot be explained that at the present time and after the special legislations of each nation had granted with all amplitude and liberality equal and identical rights to citizens and foreigners, in signing a convention between all nations which have already introduced these principles in their legislation, it should be now attempted to limit the rights granted to foreign owners of trade marks.

There might be perhaps another reason for modifying the text of the treaty of Montevideo. By mere distraction, undoubtedly, a word escaped the respectable jurists who discussed the text of that convention, which word does not express the meaning they desired to give. The words employed by the Convention of Montevideo establish only the right to use the trade marks. And, without doubt, it is not he use of the mark, which it was sought to establish, but the property of the same, which is an entirely different thing. And I make bold to say, that it was a distraction or an oversight, by which those jurists incurred in that error, because I have consulted the discussions to which the convention gave rise in that Conference, and I observe that when Art. 2. was acted upon it was said. «The right to use the marks etc.,» these expressions were modified, it being stated, that it was not intended to establish the right of the use, but that of its property. After Art. 2 was corrected in that sense, the same correction was not made in Art. 1, and they remained in contradiction to each other. In the former, the right to use the mark was established, and in the latter the right of its property. If on the present occasion we have to sanction again the text of the Convention of Montevideo; if by rendering a testimony of respect to the very important work accomplished by that Conference we have to recognize the precepts which it has established, I believe that we should try to avoid also incurring in the oversight, in which the Conference of Montevideo incurred.

Some additions might, besides, be made to the text of that convention; above all, such as may have a practical interest. Its Art. 1 establishes the right to register in the signatory nations the trade marks deposited in the country of their origin, and it is necessary, in order to avoid contradiction, to establish the exceptions, which the internal legislation of each one of the countries contain; that is, to state, that the rights of those marks cannot be reserved, which are already public property or which may be against public morals. As Art. 1 imposes an obligation upon all signatory nations, it becomes necessary also to fix the exceptions.

It would at once be incomprehensible, that the proprietors of marks could reserve their rights to such marks as are already public property, or which should be contrary to morals, even if the probability, that these latter should present themselves, is only remote.

Our moral ideas are perfectly uniform, and it is inconceivable, that the deposit of a mark should be permitted, which would be against morals, in any of the nations of America, but as I understand, it is the purpose to leave this convention open, so that any nations so desiring may adhere to the same, and it is possible that among them different principles prevail in that respect, it may perhaps be advisable to make this addition, although among the countries of America at first sight such would appear unnecessary.

›There is another addition, which it is worth while to take into account. On some occasion in the practice of my profession, I have become acquainted with a fact that happened in Mexico, by reason of the right which foreigners have to reserve their trade marks. An American company, which had obtained its trade mark in the United States and made use of the same, came to Mexico to reserve its rights. A few days after having registered the mark, the American tribunals, in a final sentence, declared that mark null, and the product, which today may be freely sold in the United States of America, cannot be sold in Mexico, because in spite of the mark being null in the United States, the proprietor continues to exercise the rights of the registered mark in Mexico.

It would thetefore be advisable, that the sentences of nullity of the marks be communicated to all the signatory nations by the government of the country in which the nullity has been declared. In that manner the rights of the public will have been saved, and at the same time the costs and damages which may be caused by the controversies between the proprietor of the mark will be avoided, which may be said to have become public property, and all those who have a perfect right to employ such mark.

I do not see any reason why these additions should not be taken into account in the new convention to be concluded, which additions do not radically modify the Convention of Montevideo and which give it greater amplitude.

It is incomprehensible, on the other hand, that today, in making a new Convention as a guaranty to the owners of trade marks, advantage has not been taken of experience, nor the work accomplished by the European nations that signed the conventions of Paris of 1883 and of Madrid of 1891.

The Convention of 1883 established an International Office at Berne, and that of 1891, in order to afford greater facilities to the proprietors of trade marks and greater guaranties against the falsification of the products, established that every mark deposited in the country of its origin, could be registered in the International Office, and thus given effect in all the nations Thich signed the Convention.

These two conventions have established two fundamental principles. First, to concede to a foreigner the same rights as to the citizens; second, not to subject the registering of trade marks to all the formalities and conditions of the local laws, or, which is the same, to give extra-territorial effect to the marks registered in an office organized and regulated by all the nations signing the convention.

Without doubt, the honorable members of the Committee have believed, that such a step would be rather too advanced, that the success of the principles of the Convention of Madrid is not altogether assured, and have not wished to expose us to the risk of making a new experience, which might be considered premature or dangerous. I profoundly respect its apprehensions and opinions in that regard.

The Delegation of Mexico, without any doubt, will give its vote in favor of the project, such as it is now formulated, and if I have desired to make these observations, it has not been with the intention to oppose it, but for the purpose, that someone might be found who would give these ideas the prestige of his name and would do so with good will, so that my honorable collegues of the Committee may State what are the motives and bases that prevent them from sharing my opinions.

His Excellency Mr. Elmore, Delegate from Peru. —I am glad that His Excellency Mr. Casasus, whose prestige is well recognized, has taken part in this debate, because this matter, although it has a very modest aspect in itself, nevertheless is of great importance for Commerce and Industry. Trade marks are useful for the consumer and for the manufacturer; for the former they are guaranties of the quality and merit of the article, and for the latter they constitute a guaranty against the falsification of his products. In this manner, trade marks form for important entreprises a very considerable part of their capital and serve in some cases to identify merchandise and to settle litigation respecting property.

For this reason I believe that the matter of trade marks of commerce and manufacture possesses great importance, and as regards commerce and the in dustries, it appears that it is worth while to claim our attention.

I proceed to occupy myself with the observations made by His Excellency Mr. Casasus. His Excellency refers, in the first place, to the limitation which the Treaty of Montivedeo contains respecting the rights accorded to foreigners. I understand that absolutely no limitation exists. It is true, that there is no article which establishes, that foreigners have the same rights as citizens; but if it is not so established, it is because this is already a universal principle of legislation. In fact, I do not know of any legislation which does not recognize the right of foreigners to obtain trade marks. Trade marks refer generally to articles of commerce and industry, and as the most important commerce carried on is the international one, it would be anomalous to limit the right of trade marks to citizens only. This is why it is today the universal rule, to grant trade marks with perfect equality to foreigners and citizens. It is not necessary, therefore, to make this declaration in the treaties. The declaration of Art. 1. refers, not to recognizing the rights of foreigners or citizens, but to the marks already deposited in foreign countries. Art. 1 says:

«Every person, to whom in one of the signatory countries the right to the exclusive use of a trade mark of Commerce or manufacture has been granted, shall enjoy the same privilege in the other states, subject to the formalities and conditions established by their laws.»

The treaty, as is seen by this, established the right to import a foreign trade mark; it is not a question of granting to foreigners the recognition of a right which anybody possesses, whether foreigner or citizen; the question is, that a mark obtained in foreign countries can be imported and shall enjoy the priority which it has obtained in foreign parts. It is for this reason, that I see absolutely no necessity to insert a provision with respect to foreigners, because it is not necessary.

The second observation refer to the point, that the treaty of Montevideo establishes the right of use, but not the property of trade marks. Strictly speaking, this is not a question of a right of property; the right of property is exercised over material things, and consequently, the right to a trade mark, the right of reproducing a literary work, a patent right, are not rights of property; they are rights, which may be called, as some authors have called them, intellectual ones; it is for this reason, that the term «right of property» is not a proper term, but is only employed by analogy. As there exists no other term to express this idea, Art. 1. says: «the right to use.» Afterwards it is called «privilege,» because really such it is. The word «property» is not a proper one and is only employed in an entirely conventional manner.

The third observation of His Excellency Mr. Casasus refers to the fact, that the laws of a country should not permit the importation of trade marks which are contrary to morals or which are already public property.

I believe that this reservation is not necessary to establish. In the first place, with respect to trade marks, they do not become public property; this might be said of patents of invention or literary works; but regarding a trade mark, that belongs inherently to an enterprise or an establishment, and